ERIN RILEY, Bar No. 8375
Assistant Attorney General
JOHN E. SWALLOW, Bar No. 5802
Utah Attorney General
160 East 300 South, 6th Floor
PO BOX 140854
Salt Lake City, Utah 84114-0854
Telephone: (801) 366-0180
Attorneys for Appellee
eriley@utah.gov

IN THE UTAH COURT OF APPEALS

EVERADO COLLINS,	:	STATE'S REPLY TO APPELLANT'S
	:	RESPONSE TO MOTION TO
Appellant/Petitioner,	:	SUMMARILY AFFIRM AND
	:	RESPONSE TO APPELLANT'S
vs.	:	ALTERNATIVE MOTION FOR A
	:	RULE 23B REMAND
STATE OF UTAH,	:	
	:	Case No. 20110967-CA
Appellee/Respondent.	:	

The Appellee/Respondent, State of Utah, by and through its attorney, Erin Riley, Assistant Attorney General, files this Reply to Appellant Collins' Response to the State's Motion for Summary Disposition, and a response to Appellant Collins' alternative motion for a rule 23B remand. This Court should summarily affirm the district court order dismissing the petition for post-conviction relief because the recent United States Supreme Court decision in *Chaidez v. United States*, 133 S.Ct. 1103 (2013) establishes that there is

no substantial issue for review, and the district court correctly determined that the petition was time-barred. Collins' request for a rule 23B remand should be denied.

ARGUMENT

This Court should summarily affirm the district court order which is the subject of review because the United States Supreme Court, in *Chaidez v. United States*, 133 S.Ct. 1103 (2013), confirms that the district court decision was correct when it held that the petition was time-barred under Utah's Post-Conviction Remedies Act (PCRA).

In *Padilla v. Kentucky*, 559 U.S. 356, 130 S.Ct. 1473 (2010), the United States Supreme Court "held that the Sixth Amendment requires an attorney for a criminal defendant to provide advice about the risk of deportation arising from a guilty plea." *Chaidez*, 133 S.Ct. at 1105. Appellant Collins filed a petition for post-conviction relief, alleging that he received ineffective assistance of counsel because his counsel did not advise him of the possible deportation consequences of his guilty plea (R11, 27, 53). However, his petition was not filed until fifteen years after his conviction. His petition was dismissed because it was untimely under Utah's PCRA (R275-278).

I. In light of the *Chaidez* decision, Collins' petition is clearly time-barred.

The district court dismissed the petition for post-conviction relief as untimely (R276). Collins' response to the motion for summary affirmance fails to address the PCRA's time-bar or the fact that the petition was dismissed because it was untimely. Collins' discussion of

application of the rule in *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060 (1989) is irrelevant and misses the point - that his petition was dismissed because it was untimely under Utah's Post-Conviction Remedies Act.

Under the PCRA, a petition must be filed within one year of accrual of the cause of action. Utah Code Ann. § 78B-9-107(1) (West 2010). A cause of action accrues on the last day for filing an appeal, or at entry of an appellate decision, or the last day for filing a petition for writ of certiorari, or upon entry of denial of a petition for writ of certiorari. Utah Code Ann. §78B-9-107. Collins pleaded guilty on March 26, 1996 and was sentenced on December 17, 1996. He did not file any appeal. Therefore his cause of action accrued on January 16, 1997, the last day for filing an appeal. He then had one year in which to file a timely post-conviction petition. But his post-conviction petition was not filed until March 28, 2011, fifteen (15) years after his conviction

However, under the PCRA, a cause of action may also accrue when the United States Supreme Court announces a new rule, but only if "the rule was dictated by precedent existing at the time the petitioner's conviction or sentence became final." Utah Code Ann. §§ 78B-9-107(2)(f) and 78B-9-104(1)(f)(i).

In *Chaidez*, the United States Supreme Court held that *Padilla* announced a new rule. *Chaidez*, 133 S.Ct. at 1113. But it also held that the *Padilla* rule was not dictated by

precedent, stating that "[n]o precedent of our own 'dictated' the answer." *Id*. at 1110.[1] "*Padilla's* holding that the failure to advise about a non-criminal consequence could violate the Sixth Amendment would not have been – in fact, was not — 'apparent to all reasonable jurists' prior to [the U.S. Supreme Court] decision." *Id*. at 1111, quoting *Lambrix v. Singletary*, 520 U.S. 518, 527-28, 117 S.Ct. 1517 (1997).

Padilla announced a new rule that was not "dictated by precedent existing at the time the petitioner's conviction or sentence became final." Utah Code Ann. §78B-9-104(f)(i). Because the new rule was not dictated by existing precedent, Collins' cause of action did not accrue on the date the new rule was decided. His cause of action accrued in 1997, on the last day for filing an appeal, but he did not file his post-conviction petition until 2011. Therefore his petition was untimely. The district court correctly dismissed the petition because it was untimely.

Collins acknowledges that the United States Supreme Court held in *Chaidez* that the new rule announced in *Padilla* does not apply retroactively to cases already final on direct appeal. However, Collins nevertheless argues that state courts are free to apply *Padilla* retroactively because state courts don't have to follow the rule in *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060 (1989). But the *Teague* rule is irrelevant in this case. The decision by

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[1] And, as the U.S. Supreme Court noted, it was not dictated by precedent in Utah. *Chaidez*, 133 S.Ct. at 1109, fn. 8, *citing State v. Rojas-Martinez*, 2005 UT 86, ¶¶5-20, 125 P.3d 930, 934-935.

the United States Supreme Court that *Padilla* announced a new rule that was not dictated by precedent is binding on the State courts.

Collins argues that the Utah Constitution grants this Court broad authority to apply *Padilla* retroactively. However, the cases he cites in support of this argument were all decided prior to enactment of the PCRA in 1996. As Collins even acknowledges, the Utah Supreme Court has noted that it views federal precedents as instructive but not binding "except insofar as we explicitly incorporate them into our own law on retroactivity." *Andrews v. Morris*, 677 P.2d 81, 88 (Utah 1983).

The PCRA was enacted in 1996. The PCRA includes specific statutory provisions concerning retroactive application of new rules. The PCRA states that a cause of action may accrue on the date on which a new rule is announced if the petitioner can prove that "the rule was dictated by precedent existing at the time the petitioner's conviction or sentence became final." Utah Code Ann. §§78B-9-107(2)(f) and 78B-9-104(1)(f)(i). In *Chaidez*, the United States Supreme Court held that *Padilla* announced a new rule not dictated by precedent. The new *Padilla* rule therefore does not meet the PCRA standard for accrual of a cause of action because the new rule was <u>not</u> dictated by existing precedent at the time Collins' conviction or sentence became final.

States are bound to follow their own statutory law, therefore the Utah courts are bound to follow Utah's PCRA, including its provisions governing the one year statute of limitations

and accrual of a cause of action. Collins' petition was untimely because the Supreme Court held that *Padilla* announced a new rule that was not dictated by existing precedent, and under the PCRA, a cause of action accrues on the date of decision of a new rule only if the new rule was dictated by existing precedent. Since the *Padilla* rule was not dictated by existing precedent, Collins' cause of action did not accrue on the date *Padilla* was decided. Therefore Collins' petition is untimely. *Teague* is not controlling. The PCRA is controlling. Under the PCRA, the post-conviction court correctly determined that Collins' petition was untimely.

II. Even if Collins' *Teague* argument were relevant, it is unpreserved and there is no plain error.

Even if Collins' argument concerning application of the *Teague* rule were relevant to his case, his claim is unpreserved. Collins concedes that he "fell short of arguing that the district court should apply *Teague* or not apply it (as stated in *Danforth*) more broadly than under federal retroactivity principles." Aplt's Resp. p. 6. "Generally, claims not raised before the trial court may not be raised on appeal. . . . The preservation rule applies to every claim." *State v. Crabb*, 2011 UT App 440, ¶2, 268 P.3d 193, quotation and additional cite omitted. "Additionally, to be adequately preserved, an issue must be raised specifically." *Id*. This claim is unpreserved and therefore should not be considered on appeal.

"When an issue is not properly preserved for appeal, this court may review the issue under the plain error doctrine." *Crabb*, 2011 UT App ¶6. However, to establish plain error, an appellant must show that 1) an error occurred, 2) the error should have been obvious, and

3) the error was harmful. *Id*. Collins has not shown any of these things. As addressed above, there was no error. Collins has not asserted any appropriate legal basis for this Court to consider his unpreserved argument.

III. Collins' motion for a rule 23B remand should be denied.

Collins also argues that this Court should grant a remand to the district court for a ruling on the ineffectiveness of his post-conviction counsel, pursuant to Rule 23B, Utah R. App. P. But Collins is not entitled to a rule 23B remand.

First, rule 23B does not apply to post-conviction cases. Rule 23B specifically states that a party to an appeal "in a criminal case" may move for a remand for findings necessary to determine ineffective assistance of counsel. Utah R. App. P. 23B(a). But post-conviction cases are civil actions. *Wickham v. Galetka*, 2002 UT 72, ¶10, 61 P.3d 978 ("a petition for post-conviction relief is a civil action, specifically governed by rule 65C of the Utah Rules of Civil Procedure."). Because post-conviction cases are not criminal cases, rule 23B(a) does not apply.

Second, the purpose of rule 23B is for findings necessary for making a determination of ineffective assistance of counsel. But a post-conviction petitioner has no constitutional right to the appointment of counsel in a post-conviction case, and no statutory right to the appointment of counsel in a non-death penalty post-conviction case. "[T]here is no statutory or constitutional right to counsel in a post-conviction proceeding." Therefore, petitioner "had

no right to effective appointed counsel in this proceeding." *Schwenke v. State*, 2012 UT App 18, ¶3, 269 P.3d 1004. Under section 78B-9-109 a court may appoint pro bono counsel. However, even if pro bono counsel is appointed, "[a]n allegation that counsel appointed under this section was ineffective cannot be the basis for relief in any subsequent post-conviction petition." Utah Code Ann. §78B-9-109(3).

Third, as addressed above, the PCRA is controlling - not *Teague* or any other provisions concerning retroactive application of new rules. Therefore post-conviction counsel did not err by not making the arguments current appellate counsel makes concerning application of *Teague* or other arguments concerning retroactive application of new rules.

There is no basis for a 23B remand to attempt to determine ineffective assistance of post-conviction counsel because Collins has no right to counsel, 23B is not applicable to civil post-conviction cases, and Collins' post-conviction counsel did not err.

CONCLUSION

Based on the arguments set forth in its motion for summary affirmance and in the above Reply, and pursuant to rules 2, 10 and 23 of the Utah Rules of Appellate Procedure, the State respectfully requests that this Court summarily affirm the district court order dismissing the petition for post-conviction relief, and deny Collins' request for a remand under Rule 23B.

DATED THIS _____ day of June, 2013.

JOHN E. SWALLOW
UTAH ATTORNEY GENERAL

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Erin Riley
Assistant Attorney General
Attorneys for Appellee/Respondent

CERTIFICATE OF SERVICE

I hereby certify that on the ____ day of June, 2013, I served a copy of the foregoing STATE'S REPLY TO APPELLANT'S RESPONSE TO MOTION TO SUMMARILY AFFIRM AND RESPONSE TO APPELLANT'S ALTERNATIVE MOTION FOR A RULE 23B REMAND by causing the same to be mailed, via first class mail, postage prepaid, to the following:

Hakeem Ishola and Aaron Tarin
ISHOLA TARIN, PLLC
1750 West Research Way, Suite 204
West Valley City, Utah 84119

(Counsel for Appellant/Petitioner Collins)

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